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clearly shows an intention to dedicate, since the policy favoring grants to the public dispenses with the ordinary rules of conveyance, and the formality of the dedication should suffice to convey perfect title to the public.<sup>107</sup> Since such a dedication is similar to a grant to the general public, there should be no requirement of acceptance.

### *Conclusion*

With the above analysis in mind, it would seem that the *Banta* case is correct, and the *Chevron* case is sustainable on the theory that it amounted to a formal, non-statutory dedication. *Banta* did realize the existence of this third type of dedication in the jurisprudence, but even the older authority cited by the court had been somewhat diluted by the common law. There is no objection to relying on common law precedents when dealing with a statutory or implied dedication since neither type reaches results materially opposed to principles of the civil law. But by a return to the principles of Louisiana civil law and a recognition that a complete adoption of the common law is not necessary in the limited third area of formal, non-statutory dedications, the Louisiana courts in the future could begin a consistent line of jurisprudence decided on principles which represent the best of both worlds.

Michael G. Page

## THE FICTITIOUS COMMUNITY AND THE RIGHT TO PARTITION

### *Introduction*

The Louisiana Civil Code provides that a community of acquets and gains arises from every marriage contracted in this state, unless the parties agree before marriage to a contrary stipulation.<sup>1</sup> The community is terminated when the bonds of matrimony are dissolved<sup>2</sup> or when there is a separation of property<sup>3</sup> or a separation from bed and board.<sup>4</sup> Upon the dissolution

107. See *Eggerson v. Livaudais*, 6 Orl. App. 417 (La. 1909); *City of Baton Rouge v. Bird*, 21 La. Ann. 244 (1869); *Saulet v. City of New Orleans*, 10 La. Ann. 81 (1855); *DeArmas v. Mayor and City of New Orleans*, 5 La. 132 (1833) (dissenting opinion).

1. La. Civ. Code arts. 2392, 2399, 2424.

2. *Id.* arts. 136, 2405.

3. See *id.* arts. 2425, 2430.

4. *Id.* art. 155.

of the community by any of these means, the husband and wife or their heirs are entitled each to one half the assets of the former community<sup>5</sup> and are obligated personally, as between husband and wife, to pay one half the community debts.<sup>6</sup> Until 1882 the wife or her heirs could renounce the community assets and liabilities or accept them absolutely, but could not accept them with benefit of inventory.<sup>7</sup> As a result of legislation enacted in 1882,<sup>8</sup> the wife or her heirs is allowed to accept the community with benefit of inventory. The consequences of such an acceptance are twofold: First, the husband or his administrator is empowered to administer the wife's half-interest in community assets to pay community debts, and second, the wife limits her liability for community debts to her half-interest in community assets.<sup>9</sup>

Prominent in Louisiana jurisprudence, both before and after 1882, is the concept that the husband or his administrator may administer the wife's half-interest to pay community debts, without regard to whether the wife has accepted with benefit of inventory. The courts hold that the community is continued fictitiously to pay community debts, that the wife or her heirs cannot sue for a partition of the assets until after the debts are paid, and that creditors of community obligations have a preference or privilege on the proceeds of the sale of community assets.<sup>10</sup> This practice, which will be tested in light of the legislation, raises two important questions: First, does the husband

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5. *Id.* art. 2406: "The effects which compose the partnership or community of gains are divided into two equal portions between the husband and the wife, or between their heirs at the dissolution of the marriage. . . ."

6. *Id.* art. 2409: "It is understood that, in the partition of the effects of the partnership or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage and not acquitted at the time of its dissolution."

7. *Id.* arts. 2406, 2409, 2410. See *Mongent v. Pate*, 3 La. Ann. 269 (1848). It should also be noted that *Phillips v. Phillips*, 160 La. 813, 107 So. 584 (1926), held that LA. R.S. 9:2821 (1950) abrogated LA. Civ. Code art. 2420, now repealed, which had raised a presumption of renunciation of the community if not accepted by the wife 30 days after it was dissolved.

8. LA. R.S. 9:2821 (1950): "At the dissolution for any cause of the marital community, the wife may accept the community of acquets and gains under the benefit of inventory, in the same manner and with the same benefits and advantages as are allowed heirs to accept a succession under the benefit of inventory." See generally LA. Civ. Code arts. 1032-1068, which govern the acceptance of a succession with benefit of inventory.

9. See *Rhodes v. Rhodes*, 190 La. 370, 182 So. 541 (1938).

10. See *Succession of Dumestre*, 42 La. Ann. 411 (1890), in which the term the "fictitious existence of the community" was first coined. See also *Guillory v. Latour*, 138 La. 142, 70 So. 66 (1915); *Rusk v. Warren*, 25 La. Ann. 314 (1873); *Lawson v. Ripley*, 17 La. 238 (1841).

or his administrator have the power to administer the wife's half-interest in the dissolved community even though she or they have not accepted with benefit of inventory; and second, if so, is the wife or are her heirs nevertheless entitled to an immediate partition of right if they accept the community unconditionally, or can they be forced to submit to a settlement of the former community before they are allowed a partition? Primary attention will be given to dissolution of the community by death of one of the spouses, since this mode of terminating the regime has raised ancillary questions concerning the relation of the former community to the administration of the deceased's succession. However, the same reasons are advanced by the jurisprudence to justify the fictitious existence of the community after its dissolution when it is dissolved by means other than death.<sup>11</sup>

### *The Legislation to 1960*

The history of the community of acquets and gains is replete with reference to the "continuation" of the community. The early French writers recognized that as a general rule, the community was dissolved by death of one of the spouses. But if no partition took place between the survivor and the decedent's heirs, the community might be "continued" according to local custom.<sup>12</sup> The French writers were divided over whether this was a new community or a continuation of the former marital community by operation of law. Regardless of the concept adopted, it included, besides the possessions which had been part of the community during marriage, acquisitions by the surviving spouse after dissolution made with community assets or their revenues. Acquisitions made by the children were not included, because they did not arise from exchanges for or income from community assets, which were all possessed by the surviving spouse. However, the surviving spouse had the same powers as those the husband enjoyed during mar-

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11. See *Washington v. Palmer*, 213 La. 79, 34 So.2d 382 (1948).

12. J. BRISSAUD, *A HISTORY OF FRENCH PRIVATE LAW* § 405 (1912). The ancient French law had developed the rule that communities (not marital communities, but a kind of holding in indivision) might be formed between or among any persons by the fact of common life together for a year and a day. Such a community could be dissolved merely by the decision to live separately. This concept of general application was used to develop the theory that the marital community could be "continued" if the survivor and the children continued to live together after dissolution.

riage. This "continued" community ended upon the death of the surviving spouse, upon a second marriage, or, according to certain customs, upon a partition carried out at the children's demand when they came of age.<sup>13</sup> A similar concept obtained in the Spanish law, which provided that a new *sociedad*, an ordinary partnership, might be formed tacitly between the survivor and heirs if they continued to hold their property in common,<sup>14</sup> and as with the French, acquisitions by the children did not enter into it. The Spanish referred to this partnership as an ordinary *sociedad*, as distinguished from the marital community, which was termed *sociedad de gananciales*.<sup>15</sup>

The Louisiana supreme court in the early 1800's held that no such custom of a "continued community" developed in Louisiana.<sup>16</sup> The only direct legislative authority for a continued community is in the instance of an absent spouse. The absentee's husband or wife may prevent the putting of the absentee's heirs into provisional possession of the absentee's patrimony, his separate assets and liabilities and half of the community, and elect to continue the marital community.<sup>17</sup> Notice should also be directed to Civil Code article 1292,<sup>18</sup> which, in providing for a tacit community of property when co-heirs continue to own inherited assets in indivision, might afford a basis for the same kind of partnership spoken of in both the ancient Spanish and French laws concerning the surviving spouse and the deceased's heirs. However, the concept of the fictitiously continued community, as it developed in the Louisiana decisions, is different from these. It is that the community has but a *fictitious* existence and *only* for the purpose of paying community debts. The inquiry thus narrows to whether the hus-

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13. *Id.* at § 564.

14. G. SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO art. 58 (1851). See also Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1, 31 (1969).

15. Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1, 31 (1969).

16. *Dickson v. Dickson*, 36 La. Ann. 453 (1884); *Broussard v. Bernard*, 7 La. 216 (1834); *Pizerot v. Meuillon's Heirs*, 3 Mart. (O.S.) 97 (La. 1813).

17. LA. CIV. CODE arts. 64, 65.

18. *Id.* art. 1292 provides: "When a person, at his decease, leaves several heirs, each of them becomes an undivided proprietor of the effects of the succession, for the part or portion coming to him, which forms among the heirs a community of property, as long as it remains undivided." Article 1290 indicates that this article could be applied to the ownership in indivision following the dissolution of the marital community. But this community after dissolution would only continue until one of the co-owners demanded a partition.

band, or his heirs, administrator, or executor have any power to administer the wife's half-interest to pay community debts, when the wife or her heirs have not accepted with benefit of inventory, either until she or her heirs demand a partition, or even against their demand for an immediate partition.

The publication of the de la Vergne copy of the 1808 Digest with Moreau-Lislet's source notes on the interleaves affirms that our matrimonial regime law is Spanish in origin.<sup>19</sup> Both article 68<sup>20</sup> and article 71<sup>21</sup> of the 1808 Digest, Book III, Title 5, which provided for division of the community assets and liabilities upon dissolution of the regime, were taken primarily from the Spanish writer, Febrero.<sup>22</sup> The Spanish law was well settled that after dissolution the husband would continue to be liable personally to the community creditors for the full amount of the community debts, since he had incurred them.<sup>23</sup> The wife, on the other hand, became liable personally both to the husband and to the community creditors for one half the community debts only if she accepted half the community assets.<sup>24</sup>

19. Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1 (1969).

20. See REPRINT OF THE DE LA VERGNE VOLUME: THE DIGEST OF THE CIVIL LAWS, TERRITORY OF ORLEANS IN 1808, WITH MOREAU-LISLET'S SOURCE NOTES, art. 68 tit. 5, bk. III, pp. 336-37 (1968). The following sources are listed for art. 68, tit. 5, bk. III (now LA. CIV. CODE art. 2406, which provides for the division of the assets of the community): FUERO REAL 3.3.3; FEBRERO, LIBRERIA DE ESCRIBANOS (1739): CONTRATOS TRATADO DE 1.1.22. 236-244; FEBRERO LIBRERIA DE ESCRIBANOS: JUICIOS, TRATADO DE (1789) 4.1.1.4.1.1, 2, 3, 5, 11, 12; FEBRERO LIBRERIA DE ESCRIBANOS: JUICIOS, TRATADO DE (1789) 4.1.1.5.5. 38-39.

21. See REPRINT OF THE DE LA VERGNE VOLUME: THE DIGEST OF THE CIVIL LAWS, TERRITORY OF ORLEANS IN 1808, WITH MOREAU-LISLET'S SOURCE NOTES, art. 71, tit. 5, bk. III, pp. 338-39 (1968). The following sources are listed for art. 71, tit. 5, bk. III (now LA. CIV. CODE art. 2409, which provides for the division of the debts of the community): FEBRERO LIBRERIA DE ESCRIBANOS: JUICIOS, TRATADO DE (1789) 4.1.1.3.1.1.; FEBRERO LIBRERIA DE ESCRIBANOS: JUICIOS, TRATADO DE (1789) 4.1.1.4.2.69.

22. See notes 20, 21 *supra*.

23. Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1, 41 n.273 (1969). See also 3 PLANIOL, CIVIL LAW TREATISE no. 1068 (La. St. L. Inst. transl. 1959) in which it is pointed out that since the husband contracted the debts personally, he can be proceeded against for the whole of the debts, although the wife will ultimately have to reimburse him for one half, if he is actually forced to pay the whole amount. See also J. BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW § 571 (1912).

24. Matienzo, Comm. to N.R. 10.4.9, Gloss. I, no. 8; Azevedo, Comm. to N.R. 10.4.9., nos. 15 and 18; FEBRERO LIBRERIA DE ESCRIBANOS: JUICIOS, TRATADO DE (1789), 1.1.3.2.60. See also G. MCKAY, A TREATISE ON THE LAW OF COMMUNITY PROPERTY § 1464 (1925).

These authorities make it clear that as between husband and wife, each will ultimately bear one-half of the community debts, so that if the husband is forced to satisfy all the debts, he can get reimbursement for one-half of them from the wife.

Febrero notes the silence of ancient Spanish laws and writers as to the manner of settling the community after dissolution.<sup>25</sup> He suggests that the distribution of assets and payment of debts probably was handled informally by the heirs and surviving spouse without the aid of a judicially appointed administrator, except in the case of an insolvent or vacant succession.<sup>26</sup> In that instance, the community assets and liabilities had to be determined before the deceased's succession was administered, for these or a part of them, depending on whether or not the wife accepted the community, might form a part of his succession and would be administered in it.<sup>27</sup> It appears that the Spanish commentators did not contemplate an administration of the community as a unit after dissolution. Febrero did not suggest that anyone had the right to liquidate the community as such,<sup>28</sup> and he did not even list a surviving spouse or community representative as one of the persons required to take inventories.<sup>29</sup> Under Spanish law it was clear that a partition could have been demanded before the community debts were paid.<sup>30</sup>

Although the ancient Spanish writers spoke of the payment of community debts, they were speaking in terms of accounting procedures, as illustrated by the notarial writings of Febrero,<sup>31</sup> rather than of liquidation measures. There was nothing in the Spanish legislation to indicate that the community formed a separate mass for liquidation or that community creditors enjoyed any preference over the spouses'

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25. FEBRERO LIBRERIA DE ESCRIBANOS: JUICIOS, TRATADO DE (1789) 1.1.3.3.77.

26. Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1, 33 (1969).

27. *Id.* at 33.

28. *Id.* at 32.

29. FEBRERO LIBRERIA DE ESCRIBANOS: JUICIOS, TRATADO DE (1789) 1.1.1.2.42.

30. Gutierrez, Quaestio CXXIII, no. 1; Matienzo, Comm. to N.R. 10.4.5., Gloss XX, nos. 2 and 3; Azevedos, Comm. to N.R. 10.4.6, no. 4; and Comm. to N.R. 10.4.8, no. 4. See also G. SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO art. 61 (1851), which reads as follows: "When the community is dissolved for any of the foregoing causes, either party has the right to proceed to the immediate settlement of the same by paying his share of such debts. But the community affairs may be settled and the community wound up and its property distributed in the succession of the deceased husband." Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1, 32, 33 (1969).

31. Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1, 39, 40, especially 40 nn. 268, 269 (1969). See also 3 PLANIOL, CIVIL LAW TREATISE nos. 1238-1, 1238-2 (La. St. L. Inst. transl. (1959)), which indicate that the "settlement" of the community was also in the nature of an accounting procedure on paper, with credit and debit columns.

separate creditors.<sup>32</sup> After dissolution, the community creditors were limited to seeking satisfaction from the respective spouses or their heirs to the extent of their respective personal liabilities. From the husband or his heirs total satisfaction could be demanded; from the wife or her heirs nothing could be demanded if she or they renounced the community, and only one half the debts if they accepted the community, unless she or they had obligated herself or themselves personally for more. In any of these situations the community creditors could demand satisfaction out of the total patrimony of the obligated spouse or his heirs—i.e., out of his or their separate assets as well as out of those assets belonging to him or them which formerly formed part of the community. If the debtor spouse or his heirs were insolvent, the community creditors were obligated to compete with the separate creditors for payment out of his total assets; community creditors did not enjoy a preference over the separate creditors.<sup>33</sup>

Because Louisiana matrimonial regime law is rooted in these ancient Spanish concepts of the community, it is understandable that there are no articles in the Louisiana Civil Code concerning liquidation of the community as an entity or the rights of third parties against community assets as a separate patrimonial mass. Under the old Spanish law the community of acquets and gains was a contractual agreement between husband and wife, and third parties had rights and obligations as to the husband and wife only as individuals, not as to the community as an entity. Such is the law in both respects under the Civil Code today,<sup>34</sup> where the community regime is not ever subjected to the ordinary law of partnership.<sup>35</sup> There is

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32. Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1, 40 (1969). See also 3 PLANIOL CIVIL LAW TREATISE nos. 905, 1352 (La. St. L. Inst. transl. 1959). No. 905 makes clear that at no time does the community have a separate legal personality distinct from the spouses who compose it. At dissolution, the spouses' respective shares in the community will be commingled with their separate property, and the creditors of the former community will compete with the separate creditors of the spouses. No. 1352 points out that community creditors cannot claim any priority on the common estate against the separate creditors of the spouses.

33. Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1, 41, 42 (1969).

34. See LA. CIV. CODE arts. 2325, 2402, 2403, 2404, 2406, 2408, 2409, all of which are found in bk. III (entitled Of the Different Modes of Acquiring the Ownership of Things), tit. VI (Of the Marriage Contract, and of the Respective Rights of the Parties in Relation to Their Property).

35. *Id.* art. 2807.



no legislative basis in Louisiana for either the fictitious continuation of the community to pay the community debts or for a preference or privilege for community creditors. The lawful causes of preference are privilege and mortgage,<sup>36</sup> and privilege can be claimed only in those instances expressly mentioned in the Code.<sup>37</sup> Nowhere in the Code is there a privilege in favor of creditors of community obligations. The community creditors may proceed either against the husband or his administrator for the whole of the debts,<sup>38</sup> or against the wife, if she accepts the community, for half the community debts.<sup>39</sup> In each case the liability of the spouses is personal and the rights of community creditors are those of ordinary creditors only.

Although there is no legislative basis for continuing the community by operation of law to pay the community debts, there are some instances when the husband or his administrator may administer the wife's half-interest on other bases. As discussed previously, the wife may consent to this administration by accepting with benefit of inventory. The wife or her heirs may also designate the husband or his administrator as their mandatary.<sup>40</sup> If no mandate is conferred and the husband or his administrator uses community assets to pay community debts without objection from the wife or her heirs, the husband or his administrator should be held to have acted as a *negotiorum gestor*.<sup>41</sup> The gestor is bound to act as a prudent

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36. *Id.* art. 3184.

37. *Id.* art. 3185.

38. *Id.* art. 2409. As has been pointed out, the husband is liable to third persons for all of the community debts because he personally incurred them. His liability to third persons is not automatically reduced to one-half if the wife or her heirs accept the community because this could only be accomplished by the express consent of the creditor to the substitution and by the express release of the husband for one-half of the community debts. See in this regard *id.* art. 2192. See also *id.* art. 3182, which states that the debtor must pay his debts out of all of his property, movable and immovable, present and future. This justifies making even the husband's separate property liable for a community debt.

39. *Id.* art. 2409.

40. *Id.* art. 2985. A mandate conceived in general terms confers only a power of administration (art. 2996), and to alienate, buy, mortgage, or to do anything other than acts of mere administration, the power to do so under a general mandate must be express (arts. 2996, 2997). But article 3000 provides that powers granted to persons who fulfill certain functions or do business in the ordinary course of affairs to which they are devoted need not be specified, but are inferred from the functions which the mandatary exercises. Since the husband had administered the community as its head while it existed, this article might permit him or his administrator to liquidate the former community under merely a general mandate, without an express specification of powers.

41. *Id.* arts. 2295-2300.

administrator for the affairs of the owner,<sup>42</sup> and if the gestor fulfills this standard of care, the owner is obligated for the gestor's acts whether or not the owner knew of the management.<sup>43</sup> But the wife or her heirs may at any time put an end to the gestor's management and assume it for themselves, for the gestor may not impose his services on the owner against the owner's will.<sup>44</sup>

The wife or her heirs have a right to an immediate partition,<sup>45</sup> and they are entitled to a partition in kind, if at all possible.<sup>46</sup> This comports with Code articles 2406 and 2409, which provide that the wife is entitled to one half of the specific assets in the community and is obligated to pay one half of the community debts. Indicative that an immediate partition of the former community was contemplated is article 1135, repealed in 1960, under which the curator of a vacant succession or of absent heirs was bound, immediately after his appointment, to sue for a partition to ascertain the part of the community or the partnership belonging to the deceased and which would form part of his succession for administrative purposes.<sup>47</sup> Article 1337 indicates that during partition, if the co-owners' creditors so demand, some provision may have to be made to pay debts.<sup>48</sup> The wife or her heirs may offer to pay her or their

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42. *Id.* arts. 2298.

43. *Id.* arts. 2295, 2299. The equity referred to in article 2299 is defined in article 1965 as general Christian and moral principles. But particularly appropriate to the *negotiorum gestio* situation is the principle that no one should enrich himself at the expense of another.

44. The gestor is only to act for the owner until the owner can attend to the business himself (*see id.* art. 2295), and if the owner forbids the gestor to manage his affairs, then the gestor is without authority to do so. Equity would not obligate the owner to comply with obligations forced on him over his objection (*see id.* arts. 1965, 2299).

45. *Id.* arts. 1289, 1308.

46. *Id.* art. 1290 provides that the rules in the chapter on partition (arts. 1289-1414), with the exception of those relating to collation, apply to co-proprietors of the same thing. *See* in this regard *Demoruelle v. Allen*, 218 La. 603, 50 So.2d 208 (1950). Article 1337 suggests that the wife or her heirs have the right to demand a partition in kind; and LA. CODE CIV. P. art. 4606 states that a partition in kind is to be allowed, if possible. Although article 1337 refers to a public auction, LA. CODE CIV. P. art. 4614 makes clear that the sale may be either public or private.

47. The decisions are divided on whether or not this article was to be applied to the community of acquets and gains. For the negative position, *see* *Succession of Geddes*, 36 La. Ann. 963 (1884), and *Succession of Dumestre*, 42 La. Ann. 411 (1890). For a contrary holding, *see* *Festivian v. Clement*, 135 La. 938, 66 So. 304 (1914).

48. LA. CIV. CODE art. 1337: "Each of the coheirs may demand in kind his share of the movables and immovables of the succession; but if there are creditors who have made any seizure or opposition, or if a majority of the coheirs are of opinion that the sale is necessary in order to satisfy the debts

share of the community obligations with their separate property, if they have any. However, even if the wife or her heirs have no separate property, but only the half-interest in the former community, it is submitted that a partition should be allowed if demanded. Neither the courts nor the community creditors should be allowed to second-guess how the wife or her heirs will handle their share of the debts; all that the legislation requires is that they assume personal liability for one half the community debts. If the community creditors feel insecure under this procedure, they may prevent the partition in kind by seizing the undivided interests of both husband and wife or their heirs, and if they are judgment creditors, by executing upon them.<sup>49</sup> At the resulting sale, the wife or her heirs, if they are able, will be permitted to purchase the specific assets they desire.<sup>50</sup>

### *The Jurisprudence*

A survey of the Louisiana decisions concerning whether or not the community must be liquidated before a partition can be effected reveals seemingly hopeless contradiction. At first there appear to be two distinct lines of cases—one holding that the husband or his administrator may administer the dissolved community as a whole to pay the common debts, at least as long as the wife does not object, and perhaps even against her objection;<sup>51</sup> and the other holding that once the community

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and charges of the succession, the movables shall be sold at public auction, after the usual advertisements." See note 46 *supra*, which explains how this article might be applied to the dissolved community by virtue of article 1290.

49. *Id.* art. 1337 indicates that the undivided interests may be seized. Although no distinction is drawn in the article, the writer suggests that the article envisions only succession creditors as seizing creditors, in the case of co-heirs, and not the case of a separate creditor of one of the co-heirs seizing his debtor's undivided interest. Likewise, if the dissolved community were involved it is submitted that the article would allow only community creditors to prevent a partition in kind by seizing the totality of the undivided interests and by executing upon it. Where only the undivided interest of one of the spouses is under seizure, the other spouse or his heirs is still entitled to a partition. See *Giglio v. Giglio*, 159 La. 46, 105 So. 95 (1925). It should also be noted that although LA. CODE CIV. P. art. 3501 allows property to be seized without a judgment by a writ of sequestration, articles 2291 and 3510 stipulate that there can be no execution on property without a final judgment.

50. LA. CIV. CODE arts. 1290, 1343; LA. CODE CIV. P. art. 4614. But see *Fertel v. Fertel*, 226 La. 307, 76 So.2d 377 (1955) and *Prescott v. Gordon*, 22 La. Ann. 250 (1870), which do not construe art. 1343 in this manner.

51. *Washington v. Palmer*, 213 La. 79, 34 So.2d 382 (1948); *Succession of Ratcliff*, 212 La. 563, 33 So.2d 114 (1947); *Tomme v. Tomme*, 174 La. 123, 139 So. 901 (1932); *Bossier v. Herwig*, 112 La. 539, 36 So. 557 (1904); *Thompson*

is dissolved, neither the husband nor his administrator has any authority to administer it intact as the husband had done during its existence.<sup>52</sup> The writer suggests that the two lines of cases are reconcilable *inter sese*, but that this reconciliation, to the extent that it would affirm the right of the husband or his administrator to settle the community as a whole to pay debts over the wife's demand for a partition, is inconsistent with the legislation.

*Broussard v. Bernard*,<sup>53</sup> decided in 1834, held that upon dissolution, the interest of the wife or her heirs attached immediately; and the surviving husband or his administrator had no right to administer the community as the husband had during the marriage, and could not alienate the wife's interest in such assets.<sup>54</sup> *Lawson v. Ripley*,<sup>55</sup> decided in 1841, held that neither

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*v. Vance*, 110 La. 26, 34 So. 112 (1903); *Messick v. Mayer*, 52 La. Ann. 1161, 27 So. 815 (1900); *Zeigler v. His Creditors*, 49 La. Ann. 144 (1896); *Verrier v. Lorio*, 48 La. Ann. 717, 19 So. 677 (1896); *Landreaux v. Louque*, 43 La. Ann. 234 (1891); *Webre v. Lorio*, 42 La. Ann. 178, 7 So. 460 (1890); *Succession of Dumestre*, 42 La. Ann. 411 (1890); *Bartoli v. Huguenard*, 39 La. Ann. 411 (1887); *Oriol v. Herndon*, 38 La. Ann. 759 (1886); *Succession of Bright*, 38 La. Ann. 141 (1886); *Killelea v. Barrett*, 37 La. Ann. 865 (1885); *Ealer v. Lodge*, 36 La. Ann. 115 (1884); *Succession of Boyer*, 36 La. Ann. 506 (1884); *Durham v. Williams*, 32 La. Ann. 162 (1880); *Cestac v. Florane*, 31 La. Ann. 493 (1879); *Burton v. Grugier*, 30 La. Ann. 478 (1878); *Riley v. Condran*, 26 La. Ann. 294 (1874); *Ricker v. Pearson*, 26 La. Ann. 391 (1874); *Rusk v. Warren*, 25 La. Ann. 314 (1873); *Sadler v. Kimbrough*, 24 La. Ann. 534 (1872); *Willard v. Peyton*, 24 La. Ann. 342 (1872); *Baird v. Lemee*, 23 La. Ann. 424 (1871); *Chapman v. Woodward*, 16 La. Ann. 167 (1861); *Bronson v. Balch*, 19 La. Ann. 39 (1867); *Succession of McLean*, 12 La. Ann. 222 (1857); *Guice v. Lawrence*, 2 La. Ann. 226 (1847); *Ogden v. Ogden*, 10 Rob. 457 (La. 1845); *Hart v. Foley*, 1 Rob. 378 (La. 1842); *Jeaudron v. Boudreau*, 1 Rob. 383 (La. 1842); *Lawson v. Ripley*, 17 La. 238 (1841).

52. *Lewis v. Clay*, 221 La. 663, 60 So.2d 78 (1952); *Ogden v. Leland University*, 48 La. Ann. 190, 21 So. 685 (1896); *Heirs of Murphy v. Jurey & Gillis*, 39 La. Ann. 785 (1887); *Myers v. Grighan*, 34 La. Ann. 1026 (1882); *Glasscock v. Clark*, 33 La. Ann. 584 (1881); *Tugwell v. Tugwell*, 32 La. Ann. 848 (1880); *Bennett v. Fuller*, 29 La. Ann. 663 (1877); *Smith v. Syndics of Dorsey*, 5 La. Ann. 381 (1850); *German v. Gay*, 9 La. 580 (1836); *Broussard v. Bernard*, 7 La. 216 (1834).

53. 7 La. 216 (1834).

54. *Id.* at 222: "That the community of acquets and gains, as such, continues after the death of one of the partners, with all the legal effects resulting from such a relation, with authority in the husband, if he should survive, to be still regarded as head of the community, with power to bind the community property by his contracts, and to alienate it without restraint, is a proposition so repugnant to all our notions of a community, and so subversive of first principles, that it can not be for a moment admitted. Each party is seized of an undivided one-half of the property composing the mass, and the surviving party can not validly alienate the share not belonging to him." *See also* *Lewis v. Clay*, 221 La. 663, 60 So.2d 78 (1952); *Glasscock v. Clark*, 33 La. Ann. 584 (1881); *Smith v. Syndics of Dorsey*, 5 La. Ann. 381 (1850).

55. 17 La. 238 (1841).

the survivor nor the heirs of the deceased could claim his or their share of the assets until the community debts had been paid.<sup>56</sup> Some cases following *Lawson* even stated that the community debts had to be paid before it could be determined whether or not there were any assets to be divided.<sup>57</sup> The courts in *Lawson* and its adherents based their holdings on the rationale that since the husband incurred the community debts, continued to be responsible personally for all of them after the community had terminated,<sup>58</sup> and had to answer for them even out of his separate assets if the community was insufficient,<sup>59</sup> then, the settlement of the community was a natural consequence of the settling and paying of the succession debts.<sup>60</sup> When the community was dissolved by death of the wife, the creditors generally proceeded against the husband alone for satisfaction of all community debts,<sup>61</sup> for, whereas the husband was liable personally for community debts, the wife's heirs were only contingently liable for one half the community debts and even then could relieve themselves from personal liability by renouncing her succession or accepting with benefit of inventory.<sup>62</sup> The administrator of the wife's succession could not administer the community property as a whole to pay community debts.<sup>63</sup>

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56. In *Lawson*, it was said that the wife or her heirs, although their distinct interest to the community attaches at the dissolution of the marriage, have nothing to claim out of the acquets and gains until the community debts are paid.

57. *Hart v. Foley*, 1 Rob. 378 (La. 1842); *Cestac v. Florane*, 31 La. Ann. 493 (1879).

58. *Hawley v. Crescent City Bank*, 26 La. Ann. 230, 232 (1874); *Rusk v. Warren*, 25 La. Ann. 314 (1873). In *Hawley*, the following was said: "Upon dissolution of the community by the death of the wife, the responsibility of the husband in regard to community debts is not changed. He is absolutely and personally bound for their payment . . . [H]e has, so far as the final settlement and liquidation of the community after its dissolution is concerned, the same rights he had during its existence, because he is, after the dissolution, under the same responsibility for the community debts that he was before the dissolution. It is but just that he should have these powers. The community property continues under his control until the debts are paid."

59. *Succession of McLean*, 12 La. Ann. 222 (1857); *Hart v. Foley*, 1 Rob. 378 (La. 1842).

60. *Messick v. Mayer*, 52 La. Ann. 1161, 27 So. 815 (1900); *Oriol v. HERNON*, 24 La. Ann. 759 (1886); *Durham v. Williams*, 32 La. Ann. 162 (1880); *Succession of McLean*, 12 La. Ann. 222 (1842); *Lawson v. Ripley*, 17 La. 238 (1841).

61. *Baird v. Lemee*, 23 La. Ann. 424 (1871); *Lawson v. Ripley*, 17 La. 238 (1841).

62. *Washington v. Palmer*, 213 La. 79, 34 So.2d 382 (1948).

63. *Hewes v. Baxter*, 46 La. Ann. 1281, 16 So. 196 (1894); *Succession of Hooke*, 46 La. 353, 15 So. 150 (1894), in which it was said that the creditor's

Both lines of cases recognize that the wife's interest, or that of her heirs, attaches immediately and unconditionally upon dissolution of the community.<sup>64</sup> Although there are some decisions holding that the wife's interest, or that of her heirs, is only residuary and contingent until the debts are paid,<sup>65</sup> the only explanation which accords with the legislation is that the wife's interest is unconditional and that it can be considered residuary only in the sense that she takes it encumbered with her share of community debts. She is no less the owner of her half of the community assets because she takes it subject to the personal obligation to pay the debts.<sup>66</sup>

A study of the *Broussard* and *Lawson* dichotomy of cases points out that while there appears to be a conflict concerning the authority of the husband or his administrator to liquidate the community, the courts have actually found none. The decisions which adhered to the *Broussard* doctrine involved a husband's sale of specific community assets after dissolution of the regime without reference to the paying of community debts, but as if in exercise of the kind of authority he had during the regime's continuance as its head and master. In such circumstances the courts are firm in holding that his authority as head and master has ended.<sup>67</sup> In *Lawson* and the decisions which followed it, the husband's only authority was to pay community debts, and the decisions did not admit that the husband or his administrator had any power to deal otherwise with the wife's half-interest.<sup>68</sup> The court in *Landreaux v. Louque*<sup>69</sup> pointed out this distinction where there was an attempt to interpose the

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remedy is to proceed against the surviving husband and the community property.

64. *Newman v. Cooper*, 46 La. Ann. 1485, 16 So. 481 (1894); *Bennett v. Fuller*, 29 La. Ann. 663 (1877); *Hart v. Foley*, 1 Rob. 378 (La. 1842); *Lawson v. Ripley*, 17 La. 238 (1841); *German v. Gay*, 9 La. 580 (1836); *Broussard v. Bernard*, 7 La. 216 (1834).

65. *Cestac v. Florane*, 31 La. Ann. 493 (1879); *Willard v. Peyton*, 24 La. Ann. 342 (1872); *Succession of Ogden*, 10 Rob. 457 (La. 1845). *See especially* *Berthelot v. Fitch*, 45 La. Ann. 389, 12 So. 625 (1893), which said that the wife had no interest in any specific thing until the debts were paid, and *Bronson v. Balch*, 19 La. Ann. 39 (1867), in which the court said that until liquidation, the community is but a name, a hope.

66. *Bossier v. Herwig*, 112 La. 539, 36 So. 557 (1904); *Dickson v. Dickson*, 36 La. Ann. 453 (1884).

67. *See* *Heirs of Murphy v. Jurey & Gillis*, 39 La. Ann. 785 (1887); *Glasscock v. Clark*, 33 La. Ann. 584 (1881); *Bennett v. Fuller*, 29 La. Ann. 663 (1877); *German v. Gay*, 9 La. 580 (1836); *Broussard v. Bernard*, 7 La. 216 (1834).

68. *See* note 51 *supra*.

69. 43 La. Ann. 234 (1891).

holdings of the *Broussard* line against the husband who had sold community property to pay a community debt. The court held that the wife's heirs could attack a private sale by the husband in his own interest because made without authority, but they could not object to a sale of community property to pay a community debt. A careful reading of *German v. Gay*, a case closely following *Broussard*, will likewise make clear that the court there was not holding that the husband could not settle and liquidate the community, but only that he could not extend those powers to include a private sale unrelated to paying community debts.<sup>70</sup> But this accommodation of the jurisprudence *inter sese* only begs the real question of whether the wife or her heirs may be compelled to submit to an administration of the community before partition. As has been discussed, there is no legislative basis for the authority of the husband or his administrator to settle the dissolved community over the wife's objection. If he does so where there is no objection it is only as a mandatary or as a negotiorum gestor, and his power as such can continue only so long as the wife or her heirs do not demand a partition.

The jurisprudence has often held that the wife or her heirs may sue for a partition even before the community has been liquidated and without alleging that it is solvent.<sup>71</sup> The decisions have tried to reconcile this proposition with their holding that the community is continued fictitiously to pay community debts.<sup>72</sup> Some decisions have held that if there are no debts,

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70. *German v. Gay*, 9 La. 580, 584 (1836): "The pretensions of the surviving husband . . . rest upon the supposition, that he has in law a right to settle and liquidate the community, and that the rights of the wife depend upon such settlement and liquidation. If from this he infers that he can sell any of the property, composing the mass of gains of the community, we know not on what law he bases such a pretension. His authority as head of the community ceases on the dissolution of the marriage." See also *Levy v. Robson*, 112 La. 398, 36 So. 472 (1904), in which after the death of the wife, the husband mortgaged some of the community property. The heirs sued for their half interest and the court said that since the mortgage was not for a community debt, the husband had not the right to deal with their interests.

71. *Rhodes v. Rhodes*, 190 La. 370, 182 So. 541 (1938); *Tomme v. Tomme*, 174 La. 123, 139 So. 901 (1932); *Butler v. Bolinger*, 16 La. App. 397, 133 So. 778 (2d Cir. 1931); *Giglio v. Giglio*, 159 La. 46, 105 So. 95 (1925); *Ogden v. Leland University*, 49 La. Ann. 190, 21 So. 685 (1896); *Heirs of Murphy v. Jurey & Gillis*, 39 La. Ann. 785 (1887); *Glasscock v. Clark*, 33 La. Ann. 584 (1881); *Tugwell v. Tugwell*, 32 La. Ann. 848 (1880).

72. See *Succession of Dumestre*, 42 La. Ann. 411, 7 So. 624 (1890), in which was first coined the phrase that the community was "fictitiously continued" for the payment of the community debts. See also *Guillory v. Latour*, 138 La. 142, 70 So. 66 (1915).

then the community does not maintain a fictitious existence<sup>73</sup> and the wife or her heirs will be entitled to an immediate partition. If there are community debts, it would then be held that the community creditors may proceed against the intact community only if they do so before the wife or her heirs sue for partition.<sup>74</sup> Once the community has been partitioned, the community creditors must look to the respective parties for their respective shares. If the community creditors do not demand an administration of the community, the husband or his administrator is without right to champion the creditors' rights; and he cannot defeat the claim of the wife or her heirs for a partition.<sup>75</sup> This holding must be considered as inconsistent with the legislation to the extent that it allows the community creditors, if they act soon enough, to deny the wife or her heirs a partition by simply demanding an administration of the community.<sup>76</sup>

However, there is authority in the jurisprudence which correctly recognizes the wife's right to an immediate partition, apparently notwithstanding the demands of the community

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73. *Tomme v. Tomme*, 174 La. 123, 139 So. 901 (1932); *Succession of Hooke*, 46 La. Ann. 353, 15 So. 150 (1894); *Factors & Trades Ins. Co. v. Levi*, 42 La. Ann. 432, 7 So. 625 (1890); *Succession of Dumestre*, 42 La. Ann. 411, 7 So. 624 (1890); *Broussard v. Ditch*, 30 La. Ann. 1109 (1878). *See especially* *Roux v. Jersey Ins. Co.*, 98 So.2d 906, 909 n.3 (Orl. App. 1957), at which the court explains that if there are no debts, then the community does not maintain a fictitious existence. Of course, what is involved here is only the use of the wife's half interest to pay a community debt; her interest could not be used to pay a separate debt of the husband. Such a disposition is considered as the sale of the thing of another and is an absolute nullity. *See* *Sicard v. Schwab*, 112 La. 475, 36 So. 500 (1904); *Callahan v. Authement*, 99 So.2d 531 (La. App. 1st Cir. 1957).

74. *See* *Heirs of Murphy v. Jurey & Gillis*, 39 La. Ann. 785, 787 (1887). The heirs of the wife were suing for partition, and the husband opposed it. In finding for the heirs, the court used the following language: "[I]t is enough . . . that the creditors of the community are not before us seeking to enforce their claims against the community. Nor would any such inquiry be permissible in an action of this kind, which is petitory in its character and the right of the plaintiffs acquired at the instant of the death of the person from whom they inherited. The community creditors, if there are any, might have subjected this property by proper proceeding to the payment of their debts and thus divested the plaintiffs of their title to the property, but it has not been done and cannot be done in this form of action, nor by the parties to the present controversy."

75. *Rhodes v. Rhodes*, 190 La. 370, 182 So. 541 (1938); *Giglio v. Giglio*, 159 La. 46, 105 So. 95 (1925).

76. *But see* note 49 *supra*, which points out that the community creditors may be able to seize the undivided interests of both spouses in the former community before a partition has been effected and to execute upon them. It is only in this respect that the legislation would allow the community creditors to defeat the wife's demand for a partition in kind, and this results from the normal remedies available for creditors to enforce their claims and not from any matrimonial regime law regarding the settlement of the community.



creditors. These decisions have stated that the wife or her heirs may only succeed in a suit for partition on the theory that all community debts have been paid or that the suit constitutes an acceptance of the community assets and therefore an assumption of personal responsibility for their share of community debts.<sup>77</sup> This recognizes the wife's right to half the assets if she will accept half the community debts. In *Demoruelle v. Allen*,<sup>78</sup> it was held that when the community is dissolved, the spouses are entitled not to one half the net value of the community assets and liabilities, but to a one half interest in the assets themselves, which may be partitioned before the community is liquidated; and if the wife or her heirs receive specific assets by partition, they take it subject to one half the community debts. *Daigre v. Daigre*<sup>79</sup> and *Pennison v. Pennison*<sup>80</sup> have followed *Demoruelle* in holding that the wife or her heirs have an absolute right to one half the assets themselves, but they have pointed out that neither the wife nor her heirs is entitled to a judgment for one half the value of the community before it has been liquidated. This, too, accords with the legislation, which only goes so far as to grant the wife an absolute right to one half the assets themselves. When the wife asks for value, she should be considered as implicitly directing the husband or his administrator to pay the community debts and to distribute whatever value remains. There has been some further indication that if the wife or her heirs furnish money to pay her or their share of community debts, then her or their share of community assets should not have to be sold.<sup>81</sup> A

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77. *Landreaux v. Louque*, 43 La. Ann. 234 (1891). The court in this case pointed out that partition before liquidation was allowed in *Tugwell* and in *Glasscock* because it was averred in the petition that there no community debts. See also *Washington v. Palmer*, 213 La. 79, 34 So.2d 382 (1948), in which it was acknowledged that in the cases cited which allowed partition before liquidation, there were no community creditors involved.

78. 218 La. 603, 50 So.2d 208 (1950). Here the court granted the wife a partition, which the husband opposed because (1) he alleged that it was in derogation of the rights of the mortgage creditor and (2) he claimed that no partition could be effected until the community debts were paid.

79. 230 La. 472, 89 So.2d 41 (1956).

80. 249 La. 587, 187 So.2d 747 (1966).

81. See *Messick v. Mayer*, 52 La. Ann. 1161, 27 So. 815 (1900), in which the court indicated that the widow is in the same position as an heir to a succession. Unless the heir furnishes the executor or administrator with money to pay the succession debts, then the succession property may be sold to pay succession debts. Following this reasoning the widow should be able to offer to pay her share of the community debts and be entitled to one-half of the common assets, which could be determined by a partition.

partition should also be possible without liquidating the community if there is an extra-judicial settlement of the community debts.<sup>82</sup>

With the development of the fictitiously continued community, the decisions have consistently held that community creditors enjoy a priority on proceeds from the sale of community assets, with the separate creditors of the spouses being subordinate to them.<sup>83</sup> As has been pointed out, there is no legislative authority, either historical or contemporary, for such a theory. The question might arise, however, whether or not a custom has developed whereby the husband or his administrator settles the community and pays community creditors with priority. Such a custom would not be inconsistent with the legislation if restricted to the case in which the wife or her heirs offer no objection *and* where the community is solvent. But the writer submits that there can be no legitimate custom operating to deprive either the wife or her heirs of their absolute right to an immediate partition, or to create an actual privilege where the legislation has allowed none.

### *The 1960 Legislation*

The preceding discussion of the Louisiana legislation pertinent to the dissolution of the community of acquets and gains and the decisions construing it must be reappraised in light of the Code of Civil Procedure articles involving intestate<sup>84</sup> and testate<sup>85</sup> successions and judgments of possession.<sup>86</sup> Article 3001, which is the principal article in this legislation, provides in part:

"The surviving spouse in community of an intestate shall be recognized by the court on an *ex parte* petition as entitled to the possession of an undivided half of the community, and of the other undivided half to the extent that he has the usufruct thereof, without an administration of

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82. *Bordelon v. Bordelon*, 177 So.2d 137 (La. App. 3d Cir. 1965); *Saunier v. Saunier*, 217 La. 607, 47 So.2d 19 (1950); *Mayer v. Hill*, 161 So. 208 (Orl. App. 1935); *Succession of Francez*, 49 La. Ann. 1732, 23 So. 254 (1897).

83. *Scovel v. Levy's Heirs*, 118 La. 982, 43 So. 642 (1907); *Thompson v. Vance*, 110 La. 26, 34 So. 112 (1903); *Zeigler v. His Creditors*, 49 La. Ann. 144, 21 So. 666 (1896); *Newman v. Cooper*, 46 La. Ann. 1485, 16 So. 481 (1894); *Webre v. Lorio*, 42 La. Ann. 178, 7 So. 460 (1890).

84. LA. CODE CIV. P. arts. 3001-3008.

85. *Id.* arts. 3031-3035.

86. *Id.* arts. 3061-3062.

the succession, when the community is accepted, and the succession is relatively free of debt, as provided above."<sup>87</sup>

This article might be interpreted to indicate that if the deceased's succession is not relatively free from debt, then the succession creditors may demand an administration of the succession and require the survivor in community to submit to an administration of the community in the course thereof before being entitled to take possession of his or her half-interest as owner and the other half-interest as usufructuary. This construction, while not in accord with prior legislation, might certainly be considered to have codified the jurisprudence which holds that, when the husband dies, the former community is to be administered as part of his succession if the community creditors so demand. It implies that the husband's succession creditors may demand an administration and, since the deceased husband is liable personally for all community debts, the community creditors are his succession creditors and may demand that the community be administered with the succession.

This article, however, makes no distinction between the deceased husband and the deceased wife, and the construction in question must be held to allow the deceased wife's succession creditors to demand that the community be administered with the wife's succession. This would overrule all jurisprudence governing dissolution of the community by death of the wife, which has stated that the wife's administrator has no power to administer the dissolved community.<sup>88</sup> If the wife's heirs accept the community, then the deceased wife's succession becomes liable for one half the community debts, and the former community creditors become succession creditors to the extent of one half their claims against the former community.

It is submitted that the above-mentioned construction is not the proper one, as it confuses a matrimonial regime right with a succession right. Under matrimonial regime law, the

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87. *Id.* art. 3001 sets out the basic rule on putting the surviving spouse into possession of the community property. In the case of testate successions, article 3031 provides that the surviving spouse in community of the testator may be recognized by the court as entitled to the possession of the community property, as provided in article 3001. Article 3061, in implementing article 3001, states that the judgment of possession shall recognize the surviving spouse in community as entitled to the possession of an undivided half of the community property, and of the other undivided half to the extent that he has the usufruct thereof.

88. *See* note 63 *supra*.

survivor in community is entitled to an immediate partition of his or her undivided half-interest in the former community, regardless of the solvency or insolvency of either the community or the deceased's succession. In the case of the wife, all that is required is that she accept the community and assume personal liability for one half the community debts.<sup>89</sup> Only the deceased's half interest in the former community forms part of his succession. To allow, on motion of the decedent's succession creditors, who may not even be community creditors, an administration of the survivor's half-interest in the community with the deceased's succession, as article 3001 appears to do, and to condition the survivor's right to possession on the relative absence of succession debts, which may not even be community debts, is to ignore the basic principles of our matrimonial regime law. The writer suggests that the proper construction of article 3001 is that it recognizes that, in the event of an intestate succession, the survivor in community is entitled (1) to an undivided half of the community when the community is accepted (the survivor takes this half by right) and (2) to the other undivided half (as to which the usufruct of the surviving spouse under Civil Code article 916 applies)<sup>90</sup> without an administration of *the succession* when the succession is relatively free from debt. This construction would correctly isolate the survivor's right to half the former community, a matrimonial regime right which does not depend on succession debts, from the other undivided half, which involves a succession right and which does form part of the deceased's succession. If there are substantial succession debts, the succession may be administered, but the survivor's half-interest does not form a part of the deceased's succession.

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89. Pascal, *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Matrimonial Regimes*, 30 LA. L. REV. 219, 223 (1970).

90. LA. CIV. CODE art. 916: "In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have not disposed by last will and testament, of his or her share in the community property, the survivor shall hold in usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage." Article 916 is found in bk. III, tit. I (Of Successions), ch. III (Of Irregular Successions), and it does not limit the survivor's usufruct to instances in which the community is accepted by the wife. The only criterion is inheritance of community assets by children of the marriage. The article, by its own terms, is a succession right and is independent of any matrimonial regime rights.

This construction is supported by Code of Civil Procedure article 3007, which provides that succession creditors may demand security when an intestate's heirs, or the heirs and the surviving spouse, have been sent into possession of the property of *the intestate*, which includes only half of the former community over which the survivor has a usufruct. Code of Civil Procedure article 3008 provides that when security pursuant to article 3007 is not given, the court, on an ex parte motion of the creditors, may order an administration of *the succession*, and the parties sent into possession must surrender to the administrator all of the property of *the deceased*, which they have received, which in the case of the survivor will only be the deceased's half interest over which he has a usufruct. It is submitted that these articles are not authority for allowing any administration of the survivor's half-interest in the former community; nor do they require the survivor to give security for his share. This construction gives the fullest effect to all of these articles; and it is consistent with Civil Code articles 584 and 585, which indicate that where the usufructuary does not advance the amount necessary to discharge debts of the property subject to his usufruct, then so much of the property as is necessary to pay the debts may be sold.<sup>91</sup> Likewise, under articles 3007 and 3008, if the usufructuary does not furnish security, the property burdened with the usufruct may be administered with the succession of the deceased.

Since Code of Civil Procedure articles 3001-3008, 3031-3035, and 3061-3062 only involve possession of undivided interests, it is suggested that they should not be construed to defeat the right of the wife or her heirs to sue for a partition. Once the community has been accepted, the right to a partition is absolute.

Joseph E. LeBlanc, Jr.

#### DUTY OF INSURER TO SETTLE

In a society of increasing complexity, insurance has assumed a role of significant utility. The contract of insurance has become sophisticated and inclusive in its provisions; thus, interpretation of the contract and determination of its legal con-

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91. See Succession of Bringier, 4 La. Ann. 389 (1849); Succession of Fitzwilliams, 3 La. Ann. 489 (1848).